

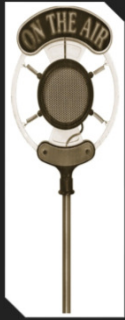
Mississippi Office of State  
Public Defender

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Presenter:

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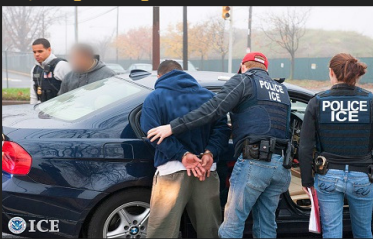
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**CREATING A DIVERSION:  
INTERRUPTING THE JAIL  
TO DEPORTATION  
PIPELINE**

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“More than 86% of those arrested by ICE had criminal convictions or pending charges.” – ICE FY2019 Ops Report



“91% of those ICE initially arrested in the interior and subsequently removed had criminal convictions or pending criminal charges at the time of arrest.”

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"86 percent of detainees are unrepresented before EOIR and the BIA." ~ Immigration Justice Campaign

It is estimated that nearly 80% of criminal defendants utilize Public Defender Services.

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## DETERMINING STATUS

- ▶ U.S. Citizen – no immigration consequence
- ▶ Legal Permanent Resident – Green card holder
- ▶ Lawful Non-Immigrants – F1, B2, H1B, R1, etc.
- ▶ Refugees & Asylees – special considerations
- ▶ Temporary Protected Status/DACA
- ▶ Undocumented and Out of Status – EWI/Overstay
- ▶ Arriving Aliens

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## Sources of Immigration Law

Immigration and Nationality Act (INA) 8 U.S.C. 1101, *et seq.* (1952).

8 C.F.R. 1.1, *et seq* – implementing regulations

U.S. Department of Justice Executive Office for Immigration Review and Board of Immigration Appeals (Administrative Courts)

Circuit Courts of Appeal

Other Players: Department of Homeland Security: USCIS, U.S. ICE, U.S. Department of State, U.S. Attorney General, Customs and Border Protection, and Department of Labor

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## DIVERSIONARY TACTICS

### WHAT IS A "CONVICTION FOR IMMIGRATION PURPOSES" AND HOW CAN MY CLIENT AVOID IT?

Definition at INA § 101(a)(48) –

- ▶ 1) judgment of guilt by court, or
- ▶ 2) if adjudication of guilt is withheld—

Judge or jury finds guilty, person admits guilt, or person enters *nolo contendere*, person admits sufficient facts and some form of punishment.

Suspended sentence=term of imprisonment

Confinement in Drug Rehab Facility=Punishment

Payment of Court Costs is not Punishment

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## CRIMINAL GROUNDS OF REMOVABILITY

- ▶ Crimes Involving Moral Turpitude (CIMT)
- ▶ - Aggravated Felony conviction - 101(a)(43)(A)-(U)(over 30+ crimes)
- ▶ - Controlled Substance Offenses
- ▶ - Firearm Offenses
- ▶ - Miscellaneous Crimes, e.g. voting, passport fraud, human smuggling
- ▶ - Domestic Violence and Crimes Against Children



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## CRIMES INVOLVING MORAL TURPITUDE

- ▶ CIMT Definition – Case Law – generally includes crimes that are inherently base, vile, and counter to accepted rules of morality
  - ▶ Render aliens Inadmissible and Removable
    - ▶ Examples of CIMTs:
      - ▶ Theft offenses
      - ▶ Sex offenses
      - ▶ Fraud offenses
      - ▶ Property offenses
    - ▶ Certain DV and Assault Crimes

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### Mississippi Controlled Substance Example

The Board of Immigration Appeals, in an unpublished opinion, held that conspiracy to transfer a controlled substance (ephedrine) under Miss. Code Ann. 41-29-139 was not an aggravated felony because federal law treats ephedrine as a "listed chemical" rather than a controlled substance and statute contains no requirement that a defendant possess ephedrine with intent or knowledge that it will be used to manufacture a federally controlled substance.



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### THE DEATH KNELL FOR ALIENS



#### AGGRAVATED FELONIES

- ▶ Definition – INA § 101(a)(43)(A)-(U) – over 30+ categories of crimes that qualify as agfels
- ▶ State Law Misdemeanor=Aggravated Felony
- ▶ Criminal Re-Entry Penalty - § 1326(a) or (b)
  - ▶ Permanent Bar to Returning to the U.S.
- ▶ Ineligible for Discretionary Relief from Deportation

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### DOMESTIC VIOLENCE RELATED CRIMES

#### DOMESTIC VIOLENCE AND VIOLATION OF PROTECTIVE ORDERS

- A non-citizen is deportable if convicted of a crime of domestic violence, stalking, child abuse, child neglect, or child abandonment, whether felony or misdemeanor. INA § 237(a)(2)(E); *Matter of Velasquez*, 25 I&N Dec. 278 (BIA 2010)(Virginia 18.2-57.2 A&B on family member does not reach "violent force" and categorically not a COV under 16(a) and not a crime of domestic violence).
- A non-citizen is also deportable if enjoined by a protective order and found by a civil or criminal court to have violated the portion of a protective order that protects against credible threats of violence, repeated harassment, or bodily injury. INA § 237(a)(2)(E)(ii); *Matter of Obshatko*, 27 I&N Dec. 173 (BIA 2017)(whether a violation of a protection order renders an alien removable is not governed by the categorical approach, even if a conviction underlies the charge (no conviction needed); Immigration Judge should consider the probative and reliable evidence regarding what a State court has determined about the alien's violation.

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## The Art of the Deal

- Early-Stage Negotiations
- Out of Court Resolutions
- Court Costs Only
- State's Interests



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## DIVERSIONARY TACTICS



- Reduced Sentence/Higher Fine (Not Restitution) or Probation
- Marijuana Beats Cocaine
- Offense Dates and Subsections
- Reduced Charge/Higher Sentence

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## DIVERSIONARY TACTICS

### SAFE HAVEN PLEA AGREEMENTS

- ▶ Client Avoids Deportation and Remains Admissible
- ▶ Client Preserves Future Immigration Eligibility
- ▶ Client Preserves Eligibility for Relief from Removal
- ▶ Scope of Duty: *Padilla & Jae Lee*



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## DIVERSIONARY TACTICS

### EXPUNGEMENTS, SIS, AND NON-ADJUDICATIONS REMAIN "CONVICTIONS FOR IMMIGRATION PURPOSES"

- ▶ SIS, Non-Adjudications
- ▶ Expungements Remain a Conviction
- ▶ Vacatur – See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) for PCR based on IAC
- ▶ Pardons – Must be President or Gubernatorial and only waives certain convictions – Recent First Circuit case: *Thompson v. Barr*, No. 18-1823 (1<sup>st</sup> Cir. 2020)

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## DIVERSIONARY TACTICS

### CLOSING REMARKS AND QUESTIONS ??

When in doubt, contact  
immigration counsel

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